Editor's note: Reconsideration denied by order dated March 19, 1974

A. O. HOLLEY

IBLA 73-344 Decided January 30, 1974

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying appellant's petition for reinstatement of oil and gas leases Anchorage 062706, 062801, and 063049 terminated for failure to pay timely the annual rental required by the lease terms.

Affirmed.

Oil and Gas Leases: Reinstatement

> It is proper to deny a petition for reinstatement of an oil and gas lease terminated for failure to pay rental as required by § 31, Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 188 (1970), where the petitioner has not shown that his failure to pay the rental on or before the anniversary date of the lease was justifiable or not due to lack of reasonable diligence, as set forth in P.L. 91-245, Act of May 12, 1970.

Administrative Practice--Appeals--Attorneys--Rules of Practice: Appeals: Generally

> An employee of a firm of certified public accountants, who is not otherwise qualified to practice before the Department, is not eligible to appear before the Board of Land Appeals on behalf of a client, notwithstanding the fact that she has been authorized by the client to act for him as his attorney-in-fact.

APPEARANCES: Barbara Halverson, for appellant.

OPINION BY MR. HENRIQUES

A. O. Holley appeals a decision of the Alaska State Office, Bureau of Land Management, dated March 7, 1973, denying his petition for reinstatement of three oil and gas leases. The subject leases terminated automatically upon failure to pay the annual rental on or before the due date, as required by 30 U.S.C. § 188(b) (1970). 1/

The appeal was entered on behalf of Holley by one Barbara Halverson, an employee of the firm of Johnson and Morgan, Certified Public Accountants, but there is no showing to indicate that Ms. Halverson is eligible to practice before this Department within the ambit of 43 CFR Part 1. 2/ Although the appeal is thus subject to summary dismissal, we have accepted it in light of the Department's holding in Barbara C. Storey, A-29584 (September 26, 1963).

1/ The relevant portion of the statute provides:

"* * * upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *." 30 U.S.C. § 188(b) (1970).

2/ The relationship between Ms. Halverson and appellant is fully explained and documented. The appellant wrote a letter to the Alaska State Office of the Bureau of Land Management, dated March 23, 1972, in which he declared that he had given Ms. Halverson authority to act in his behalf in petitioning for reinstatement of the leases at issue. This letter may be treated as a power of attorney, or appointment of Ms. Halverson to act as attorney in fact for the appellant. However, this is not sufficient to qualify Ms. Halverson to represent him on appeal to this Board. 43 CFR 4.3(a). An attorney in fact who does not appear to fall within any of the categories of persons authorized to practice before the Department is not authorized to practice merely because [s]he has a power of attorney. Hattie M. Fults, A-27509 (November 7, 1957).

Ms. Halverson has made no showing that she is qualified to appear before this Department on behalf of Holley. She has not shown herself to be an attorney at law who is admitted to practice before the courts, nor has she shown that she is eligible under any of the special circumstances listed in 43 CFR 1.3.

Where an appeal is taken by an attorney in fact, the appeal is subject to dismissal unless it is shown that the attorney in fact is authorized to practice before the Department, John W. Monzell, A-28817 (August 31, 1961); Lily L. Pearson, A-27505 (November 15, 1957); but in special circumstances, the appeal need not be dismissed if it is ratified by the appellant. See Barbara C. Storey, supra.

Under certain circumstances, reinstatement of a terminated lease is possible. The lessee must show that his failure to pay on or before the anniversary date the full amount of rental due "was either justifiable or not due to a lack of reasonable diligence on the part of the lessee." 30 U.S.C. § 188(c). In Louis Samuel, 8 IBLA 268 (1972), the Department adhered to the general rule found in 43 CFR 3108.2-1(c)(2) that "reasonable diligence" is established if the lessee can prove that he mailed the payment in sufficient time so that in the normal course of events it would be received on or prior to the due date. In this case payment was due on October 1, 1971. The rental checks were mailed by the appellant's accountant on October 4 and received by the State Office October 5. It is clear that appellant did not show reasonable diligence since the payments were not mailed until several days after the due date. The delay in mailing the payments was attributed to the fact that the payor misread the due date on the billing notice as "10 Oct 71," rather than as "1 Oct 71." This was blamed on the manner of printing, i.e., that the date was printed "1OCT71" without the usual spacing.

Neither the statute nor Departmental regulations define "justifiable." In Louis Samuel, supra, at 274, this Board attempted to give some substance to the term:

> It seems reasonably clear that Congress by the word "justifiable" was adverting to a limited number of cases, where, owing to factors ordinarily outside of the individual's control, the reasonable diligence test could not be met. This is thus a subjective test, dependent upon the factual milieu of the individual. We believe that cases which are so covered are those where the death or illness of the lessee or member of his close family, occurring with immediate proximity to the anniversary date, have been a causative factor in his failure to exercise reasonable diligence. Coming under this rubric would be natural disasters such as floods, earthquakes and the like. * * * What is clearly not covered are cases of forgetfulness, simple inadvertence or ignorance of the regulations, or * * * inability to pay.

A review of reinstatement cases since Louis Samuel provides concrete examples of what this Board has considered "justifiable." In John Rusiniak, 10 IBLA 74 (1973), the lessee had made prompt payments for several years. During the period in question he was hospitalized and could not take care of his business affairs personally. His niece attempted to handle them for him, but was not aware of the timely payment requirement of her uncle's oil and gas

lease. She mailed the payment one day before the due date; it was received a few days later. Under the circumstances, the Board decided reinstatement was appropriate.

In George E. Conley, 9 IBLA 302 (1972), the lessee's check was erroneously dishonored by his bank. A few days later, the bank president admitted the mistake in writing and tendered payment. Again, reinstatement was ordered.

On the other hand, the fact that the lessee did not receive a courtesy billing notice does not justify late payment. Louis J. Patla, 10 IBLA 127 (1973). The Board has also denied reinstatement in a case where the lessee's allegation that his bank had mistakenly refused to honor his checks was unsupported. James S. Guleke, 9 IBLA 73 (1973). And in James E. Fowler, 8 IBLA 372 (1973), reinstatement was denied when the lessee could offer no evidence to substantiate his claim that the original envelope containing the rental payment had been incorrectly addressed.

In this case the appellant's argument that the delay in payment was "justifiable" is two-pronged. First he states that prolonged illness has left him "unable to attend to the details of his business affairs himself." He had retained an accounting firm in Anchorage to handle his business for him and payment of the rental fees for the leases in question was part of their obligation. The implication we are apparently to draw from this fact is that the appellant is not personally responsible for any failure on the part of the accounting firm to make payments in the manner required by law. It is well established that a principal is responsible for the acts of his agent. The appellant cannot escape the consequences of the delay in mailing the rental fees on the ground that someone else, to whom he delegated that responsibility, was at fault.

Appellant's second justification for the late payment is that his accountant, Barbara Halverson, misread the printed due date on the billing notice. It is true that the date on the billing notice, although accurately stated, is not as clear as it might be, or as clear as due dates on other billing notices sent to the appellant, one of which was enclosed with his appeal. Nevertheless, we feel that such misinterpretation falls within the area of negligence or inadvertence which we previously have held does not constitute justifiable delay. Louis Samuel, supra, at 274. Furthermore, since failure to receive any notice at all does not justify late payment, Louis J. Patla, supra, we do not believe that a slight irregularity in the printing of the due date should result in more favorable treatment.

The appellant has thus failed to show that the delay in payment of the annual rental was either "justifiable or not due to a lack of reasonable diligence" on his part. 30 U.S.C. § 188(c). His request for reinstatement was properly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques, Member

I concur:

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Edward W. Stuebing, Member

MRS. LEWIS DISSENTING:

I disagree with the majority's finding that appellant is not entitled to have the leases reinstated.

First, the statutory provision that leases be reinstated where the payment of rental was late and "was either justifiable or not due to lack of due diligence" (30 U.S.C. § 188(c)) is remedial and should be construed liberally. See the dissents in Monturah Company, 10 IBLA 347 (1973) and Louis J. Patla, 10 IBLA 127 (1973). Further, whether late payment of rental is justifiable or not due to lack of due diligence must, I think, be determined on the facts in each individual case.

In the present case, the appellant because of prolonged illness was unable to take care of his business affairs and retained an accounting firm to carry out certain such duties for him, which included the payment of the rental in the instant case. Then, Ms. Halverson of the accounting firm was misled by the fact that the notice from the Department that the rental was due was not clearly printed. Thus appellant asserts that the payor misread the due date on the billing notice as "10 Oct. 71" rather than as "1 Oct. 71." The date in fact was printed on the notice as "1OCT71" without the usual spacing.

Appellant's case would be stronger if the nature of his illness had been explained and if a doctor's statement or affidavits by appellant as to his illness had been submitted. Nevertheless, in the circumstances herein, I would find the delay justifiable or not due to lack of due diligence. Therefore, I would find that the late rental should be accepted and the leases should be reinstated.

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Anne Poindexter Lewis, Member